

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA,
:
Plaintiff,
:
-and-
:
THE VULCAN SOCIETY, INC., for itself and on behalf of
its members, and MARCUS HAYWOOD, CANDIDO
NUÑEZ and ROGER GREGG, individually and on behalf
of a class of all others similarly situated,
:
Plaintiffs-Intervenors,
:
-against-
:
THE CITY OF NEW YORK,
:
Defendant.
:
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**SPECIAL MASTER’S
REPORT NO. 8**

07-cv-2067 (NGG)(RLM)

MARY JO WHITE, Special Master.

The Special Master submits this report pursuant to paragraph 4 of the Court’s June 1, 2010 Order Appointing Special Master (the “Appointment Order”). (Dkt. No. 448, ¶ 4). The Appointment Order requires the Special Master to submit a report at least every 90 days after the parties begin the joint development of a new firefighter eligibility exam (the “New Test”). The Special Master’s last report was submitted on September 29, 2011. (Dkt. No. 739). What follows is a report on the parties’ additional progress towards developing the New Test.

I. Progress Towards Development of the New Test

As previously reported to the Court, the current project plan includes six milestones: (i) job analysis; (ii) test development, which encompasses test design, development of exam content, content validation and pilot testing, criterion-related and construct validation, and development of various test forms and an equivalency study; (iii) test administration; (iv) analysis and scoring; (v) computation of the final test results; and (vi) preparation of the final technical report.¹ At the Special Master's instruction, the parties certify in writing at various points across these milestones that the test development process should proceed to the next phase in the project plan. To date, all parties – the United States, the Vulcan Society and the City – have agreed that the development process should proceed.²

¹ The Special Master's prior reports provide an overview of the validation methods and of the equivalency study. (*See* Dkt. Nos. 691; 739). Those terms are also described below. *See infra* at 3-4.

² To facilitate this progress, the Special Master continues to hold scheduled standing weekly telephonic conferences with the parties. These conferences are held (or not) based on the Special Master's assessment of the need to convene the parties. Since her last report, additional conferences were held on October 4th, 12th, 18th and 26th; November 1st, 8th, 15th and 22nd; and December 7th, 13th and 20th. At the Special Master's direction, certain of the conferences were conducted by her partner, Mary Beth Hogan. In addition, on December 2nd the Special Master hosted a sixth joint expert-counsel meeting at the offices of her law firm. The experts also continue to hold a standing weekly telephonic (sometimes virtual) conference with each other. Since the Special Master's previous report, the experts have held telephonic and/or virtual conferences on September 30th; October 3rd, 4th, 6th, 7th, 13th, 18th, 20th, 21st and 31st; November 3rd, 4th, 8th, 11th, 18th and 28th; and December 9th, 20th and 27th. In addition, they have held in-person meetings on October 10th, 11th, 24th and 25th and December 15th and 16th.

A. Test Development

At this juncture in the test development process, the experts have completed the criterion-related and construct validation of an experimental form of the test. They are now in the process of developing alternate test forms and performing a study to ensure that those forms are equivalent in substance and difficulty to each other and to the experimental form.

1. Criterion-Related and Construct Validation

As explained in the Special Master's prior reports, criterion-related validation is a validation technique that seeks to measure the correlation between performance on the New Test and performance on the job and in the Fire Academy. To perform this study, the experts collected job, training and other data from the FDNY. They also created a research-only job performance rating form, which they finalized based on feedback provided by firefighters during a review session. The experts then held ratings sessions during which the supervisors of the incumbents selected to participate in the criterion-related study were asked to complete the rating forms to assess their supervisees' on-the-job performance.³ The final phase of this validation method involved administering a preliminary experimental form of the test to 749 incumbent firefighters from September 14 to 17, 2011, and then performing statistical analyses of the results of that test to the job, training and other data the experts collected to determine whether performance on that test correlated with performance on the job and in the Fire Academy. (*See* Dkt. Nos. 691 at 5-7; 739 at 4). In conducting this study, the experts sought to ensure representation from

³ These rating forms are confidential and will be used only for purposes of the validation study.

across engine companies, ladder companies, boroughs, races/ethnicities, and gender. Construct validation is a validation method that uses statistical analysis to determine whether there is a relationship between the abilities being tested in the current test and previously published tests that have been demonstrated to measure the same abilities and characteristics, *i.e.*, “marker tests.” (See Dkt. Nos. 691 at 7-8; 739 at 4). To collect the data necessary to conduct this analysis, marker tests were included in the experimental form of the test administered to the incumbent firefighters in September 2011.

The experts have now completed both validation studies and have concluded that the experimental test showed sufficient evidence of validity to warrant using it in the New Test. The experts therefore agree that they can proceed with creating alternate test forms (discussed below). Like the experimental form, these forms will be computer-based and will evaluate cognitive and non-cognitive abilities. A more detailed description of these validation methods will be provided in the technical report that will be issued at the end of the test development process.

2. Development of Various Test Forms and Equivalency Study

With the validation studies completed, the experts have begun developing several alternate test forms that will be used in the upcoming administration of the exam to actual job candidates. These alternate forms, which are necessary to ensure that the test content remains secure, will be subjected to methods generally accepted by psychometric experts to ensure that they are equivalent in substance and difficulty to the experimental form. This process will also allow the experts to ensure that all candidates take tests of equal difficulty. This study is currently underway and is on schedule.

3. Tutorial in Connection with Test Administration

The experts are also working on producing a tutorial that candidates can use to familiarize themselves with taking a computer-based test, as well as to understand the type of content and questions to be included on the New Test. This tutorial will be completed in January 2012, and will be available to candidates on the Department of Citywide Administrative Services (“DCAS”) website prior to and during the administration of the New Test.

Candidates have been and will be informed of the tutorial through the Notices of Exam, FDNY and DCAS websites, and in the test admission notices that they will receive. The Special Master and parties have become aware that certain outside groups have begun offering courses to candidates. The City has written to candidates to inform them that it does not endorse or recommend any particular commercial test preparation course and to encourage them to view the tutorial once it becomes available.

B. Test Administration

The City continues to project that test administration will begin in late February or early March, and expects to be prepared to announce the new administration dates no later than January 27, 2012. (Dkt. No. 753). In prior reports, the Special Master informed the Court that this schedule assumed that the City would use the Candidate Physical Ability Test (“CPAT”) in the New Test in the same manner (scored on a pass-fail basis) it did when selecting candidates who took Exam 6019. As the Court is aware, the experts have agreed, based in part on the data gathered during the job analysis and criterion-related study phases of the test development process, that the CPAT is an appropriate test to use as the physical component of Exam 2000. (*See* Dkt. Nos. 769; 784). Accordingly, Exam

2000 will include the CPAT. The City has informed candidates of this decision. It has further informed candidates that they will receive a more detailed description of the CPAT before scheduling for the CPAT begins and that this description is expected to be available to them by April 2, 2012 on the DCAS website.

II. Updating *Amici*⁴

As the Court is aware, since May 27, 2011, the Special Master has held teleconferences with the union representatives, Chief Gala and the parties in order to provide them with updates on the status of the test development effort.⁵ Since the last report, calls have been held on October 14th and 28th; November 18th; and December 9th.⁶ With the equivalency study now underway, the Special Master and parties do not anticipate that there will be any significant developments until after that study is complete. In light of that fact and the UFA's request that the next update be an in-person meeting, the Special Master will hold an in-person conference with the Unions, parties and experts in late January or February of 2012. Additional teleconferences will be held on an as-needed basis.

⁴ As noted, *Amici* are the UFOA and UFA. The meetings and conferences held with *Amici* prior to this report and prior to May 27, 2011 are described in the Special Master's prior reports.

⁵ The experts have also attended certain of these calls.

⁶ In view of the Veteran's Day and Thanksgiving Holidays, the teleconference on November 18th took the place of the teleconferences previously scheduled for November 14th and 25th.

III. Fees

On September 3, 2010 the Court approved the Special Master's Application for Approval of Proposed Budget for Special Master's Expert Consultant, which projected monthly fees of between \$7,000 to \$17,000. (Dkt. Nos. 516, 519). The Special Master has submitted her expert's fees, which as reported in the Statements of Fees and Expenses, have fallen either under or within that projected range. Her expert, Dr. Shane Pittman, has received approved expenses and fees from the City for her fees and expenses through November. (Dkt. No. 774).

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The Special Master reiterates her thanks to the parties, experts, *Amici*, and Chief Gala of the FDNY for their past and continued assistance and cooperation in this joint effort. All engaged in this process recognize both the importance and difficulty in developing a valid and legally compliant New Test that will serve to select new firefighters for the City. To do so requires the coordination, discussion, and consideration of the views and input of several interested parties. The Special Master remains substantially satisfied with the progress made to date by the parties and their experts towards developing the New Test.

Pursuant to the Appointment Order, the Special Master will submit her next report within 90 days from today. (Appointment Order, ¶ 4).

/s/ Mary Jo White

Mary Jo White

Dated: December 28, 2011